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LEGISLATIVE ENVIRONMENT TO CORPORATE POLICIES IN THE UNITED STATES

Report prepared by

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Chapter I

INTRODUCTION AND BACKGROUND

The United States antitrust system - in effect the outlawing of certain restrictive business practices (RBPs) - is designed to protect the operations of a free market economic system. The underlying assumption is that if sellers and buyers can meet in open competitive markets, long-term goals of efficiency, innovation and fair distribution of wealth between suppliers and consumers will follow.

American antitrust rules do not apply to government-owned productive assets (for example, transportation systems in many cities), nor to certain industries where price and entry are established directly by government action (for example, public utilities for the generation of electricity). Likewise, such rules apply only in a limited way to the labour market and many sectors of agricultural production are also exempted.

The United States has a federal political system with legal authority at both the national and state levels. One result is that the legislation of individual states (for example, regulating entry and exit into certain professions) can displace federal antitrust regulation.

Despite these displacements, exceptions and modifications, antitrust considerations apply fully to productive assets accounting for the great majority (perhaps 90 per cent) of the gross national product of the United States. Thus, control of RBPs is the central legal system regulating economic activity in the country.

Chapter II

RESTRICTIVE BUSINESS PRACTICES IN THE ESTABLISHMENT OF A FIRM

New entry refers to entry into a new market by a firm or entrepreneur through expansion of an existing business organization or through a new business organization set up for the purpose of entering the market. In general (and with rare exceptions), an entrepreneur or firm may engage in new lines of business, or enter new geographical areas, without legal consequences. New entry often increases competition in those product lines or geographic markets and is not discouraged under United States law.

A. Agreements among stockholders in a new firm, or between or among joint venturers in a new firm

Agreements among stockholders in a new firm, or between or among joint venturers, are subject to the requirements of section 1 of the Sherman Act (15 U.S.C. para.1) which provides that "every contract, combination ... or conspiracy, in restraint of trade or commerce ... is hereby declared to be illegal". While the courts in the United States recognize that, in a sense, "every agreement concerning trade ... restraints" is illegal (Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918)), section 1 of the Sherman Act renders illegal only those agreements which are an "unreasonable" restraint of trade. (Idem; Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982))1/.

A parent and its wholly owned subsidiary are deemed incapable of contracting, conspiring or combining with each other for purposes of section 1 of the Sherman Act (Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984)). At the same time, when two otherwise separate business entities agree to set up their own firm - either as stockholders in a newly created firm or as "joint venturers" - agreements between those firms are subject to review as possible restraints of trade in violation of section 1 of the Sherman Act (e.g. United States v. Pan American World Airways, Inc., 193 F. Supp. 18, 33-36 (S.D.N.Y. 1961), rev'd on other grounds, 371 U.S. 296 (1963) (agreement between 50/50 shareholders to divide markets for air transportation services examined under section 1 of the Sherman Act))2/.

1/ Generally the question of whether a particular action violates section 1 of the Sherman Act turns on an analysis under the so-called "rule of reason". See Arizona v. Maricopa County Medical Society, 457 U.S. at 343. Nevertheless, certain actions are considered to be so anticompetitive that they are demed to be a violation of hte antitrust laws without regard to the Rule of Reason analysis. These are "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use". Northern Pacific R. Co. v. United States, 356 U.S. 1,5 (1958). Such agreements are "per se" violations of the antitrust laws, id., and include violations such as agreements to fix prices or to divide customers or territories among competitors.

2/ In chapter IV below, a number of practices that may be deemed to be "unreasonable" restraints of trade under the Sherman Act are identified and discussed.

B. Organization of the firm through mergers

When a firm enters into new product lines or geographical markets by acquiring the securities or assets of another firm, section 7 of the Clayton Act, 15 U.S.C. para. 18, applies. Section 7 prohibits such acquisitions "where in any line of commerce ... in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly". This statute combines elements which bar unreasonable restraints of trade under section 1 of the Clayton Act and as well as monopolization under section 2 of the Sherman Act. Section 7 of the Clayton Act has an additional feature - a legislative purpose to reach anticompetitive tendencies in their "incipiency" and to make unlawful acquisitions on proof only of "probable" (not actual or fully complete) anticompetitive effects - which makes "the test for measuring the legality of any particular economic arrangement under the Clayton Act ... less stringent than those used in applying the Sherman Act" (Brown Shoe Co. v. United States, 370 U.S. 294, 318 n. 33, 323, 329 (1962)). Since 1950, when the scope of the acquisitions covered by section 7 of the Sherman Act was expanded, most mergers and acquisitions have been tested under the standard of "probable" anticompetitive effects.

The central question in merger enforcement in the United States is whether the combination of firms creates an unacceptable concentration of market power. An analysis of the market power effects of a particular acquisition or merger begins with an identification of the "relevant market" affected by the merger. This calls for analysis of both the "line of commerce" (or product market) and the "section of the country" (or geographic market) (see Brown Shoe, 370 U.S. at 324). In general, the relevant product market is determined by "the reasonable interchangeability of use or the cross elasticity of demand between the product itself and substitutes for it" (Brown Shoe, 370 U.S. at 325; see also United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 394-400, 404 (1956))[3/].

Merger decisions and merger policy in the United States involve the consideration of many factors[4/] and have been influenced by shifting economic

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3/ The United States Department of Justice has issued "Merger Guidelines" in 1982 and in 1984 which describe a method for determining "relevant market". The Guidelines start with the concept of a hypothetical monopolist (or group of firms with monopoly power) and then examine the effectiveness of "small but significant and non-transitory" price increases. Under the Department of Justice method, if such a price increase would be unprofitable because buyers would shift to another (presumably interchangeable) product, the "relevant market" is too small and should be expanded to include the product of which the customers would shift as a result of the price increase (1984 Guidelines para. 2.1.). The Department of Justice Guidelines are not binding on the courts (Fruehauf Corp. v. FTC, 603 F. 2d 345, 353-54 (2d Cir. 1979)).

4/ The Supreme Court in Brown Shoe, 370 U.S. at 322, n. 38, stated: "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market - its structure, history and probable future - can provide the appropriate setting for judging the probable anti-competitive effects of the merger".

views, changing enforcement and judicial attitudes, and other factors. For these reasons, generalizations about mergers and merger policy under United States law are difficult to assert.

Most antitrust analyses recognize three primary categories of mergers: horizontal mergers, vertical mergers and conglomerate mergers.

1. Horizontal mergers

A horizontal merger involves a combination of firms operating in the same product and geographic market. The primary determinant of whether a horizontal merger violates section 7 of the Clayton Act is the market share (and hence market power) that would be brought about by the merger (Brown Shoe, 370 U.S. at 328).

In an atomized market with many sellers (or buyers), the merger of two or more sellers (or buyers) would not entrain substantial anticompetitive effects. In such markets, where the participants may be characterized as "price takers", the merger of two market participants does not tend to influence prices or other competitive terms.

At the other end of the spectrum, a merger that would lead to high concentration in a market, approaching monopoly power, poses high risk of anticompetitive effects. Monopoly power is the "power to control prices or exclude competition," (United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. at 391) and a threshold for monopoly power might be taken to be a level in excess of approximately two-thirds of the market (see (United States v. Rockford Memorial Corporation, [citation] (7th Cir. 1990); United States v. Aluminum Company of America 148 F.2d 416, 424 (2d Cir. 1945) (L. Hand, J.)).

When combined market shares of the merging companies are high, though still far short of monopoly power, a presumption of anticompetitive effects may attach (United States v. Philadelphia National Bank, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat"))[5/]. When a market is highly concentrated, the acquisition by one of the leading firms of even a small competitor can be anticompetitive.

In (United States v. Aluminum Co. of America (377 U.S. 271, 278-81 (1964)), the Supreme Court found a violation of section 7 of the Sherman Act

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5/ An analysis that goes beyond mere concentration figures may nevertheless be appropriate under section 7. For example, in a 1974 case involving a merger that could have been declared illegal under market concentrations used by the Supreme Court in earlier cases, the Supreme Court sustained a merger saying: "the question before us is whether the district court was justified in finding that other pertinent factors ... mandated the conclusion that no substantial lessening of competition had occurred or was threatened by the acquisition ..." United States v. General Dynamics Corp., 415 U.S. 486, 497-98 (1974). See also 1982 and 1984 Antitrust Guidelines, supra, n.5.

in a concentrated market[6/] when the largest competitor, Alcoa (27.8 per cent share), acquired one of the smallest, Rome Cable (1.3 per cent share).[7/]

2. Vertical mergers

Vertical mergers refer to mergers in which one firm acquires another firm at a different level in the supply chain. For example, the acquisition by a manufacturer of a supplier of parts for the manufactured product would be a vertical merger. Such mergers do not eliminate an existing competitor from a market; yet there may be concern that either the acquiring or the acquired firm may be so substantial a buyer or seller in the other firm's market that there may be a form of "foreclosure" of competition in that market (Fruehauf Corp. v. FTC, 603 F.2d 345, 352 (2d Cir. 1979)). Another concern is that such a merger may force actual or potential competitors to enter the market only on a vertically integrated basis (idem). Still, vertical acquisitions are not generally thought to pose as high a risk of anticompetitive problems as horizontal mergers.[8/]

Vertical mergers do present other anticompetitive possibilities, particularly when the acquired firm is operating in a highly concentrated market and the acquiring firm is a "potential entrant" to that market. For example, in Ford Motor Co. v. United States, (405 U.S. 562 (1972)), the Supreme Court found anticompetitive the acquisition by Ford, one of three major auto manufacturers in the United States, of Autolite, one of three manufacturers of spark plugs and a supplier to Ford and other manufacturers.

6/ Nine companies accounted for 95.7% of total output in this market (377 U.S. at 278).

7/ The Supreme Court went on to say that "Rome seems to us that prototype of the small independent that Congress aimed to preserve by para. 7" (377 U.S. at 281). The Supreme Court has commented in another merger case that the analysis of the effects of a proposed merger under section 7 is not ruled entirely by purely economic considerations, such as lower costs and prices. For example, in Brown Shoe, 370 U.S. at 344, the Supreme Court said:

> "We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision".

More recent enforcement positions of the Department of Justice have stressed that "efficiencies" will be taken into account, indeed given important weight, in the Department of Justice's determination of whether to challenge a particular merger (1984 Merger Guidelines, para. 3.5, 4.24).

8/ For example, in Fruehauf Corp. v. FTC, cited in the text above, the Court rejected the FTC's conclusion that the acquisition by Fruehauf, a manufacturer of truck trailers, of Kelsey, a manufacturer of heavy-duty wheels (HDW), was anticompetitive when the maximum "foreclosure" in the HDW market was 5.8 per cent (603 F.2d at 360).

The Supreme Court upheld the lower court's "potential competition" theory[9/] as well as its finding that a 10 per cent foreclosure of the spark plug market was anti-competitive and "aggravated an already oligopolistic market" (405 U.S. at 567-70).

3. Conglomerate mergers

Conglomerate mergers are those (in which the acquiring and the acquired firm are not competitors or suppliers (FTC v. Procter & Gamble Co., 386 U.S. 568, 577 n. 2 (1967)). Therefore, conglomerate mergers do not "foreclose" existing competition as may horizontal - or even vertical - mergers. Hence the focus in conglomerate mergers is on "potential competition" issues.

In Procter & Gamble Co., supra, the Supreme Court required the divestiture of Procter & Gamble's interest in Clorox, the leading manufacturer of liquid household bleach (with 48.8 per cent of the market). Procter & Gamble was a large diversified household goods maker. Characterizing the acquisition of Clorox as a "product extension merger" [10/], the Supreme Court held that the effect of the acquisition was to entrench Clorox as the dominant firm in the market and to inhibit new entry, while eliminating Proctor & Gamble the "most likely potential entrant", as a potential competitor in the market (386 U.S. at 581).

United States v. Falstaff Brewing Corp., (410 U.S. 526 (1973)), was a "conglomerate" merger involving entities selling the same product, but in different geographic markets. In that case, the Supreme Court concluded that the acquisition by Falstaff, the fourth largest brewer in the United States, of Narragansett, a regional brewer in the north-east, could be barred as anticompetitive if the lower court were to find simply that Falstaff was a "potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence in competitive conditions in that market", that the potential competition it offered was "substantial", and that this potential competition was eliminated as a result of the merger (410 U.S. 532-33).[11/]

The United States has in effect abandoned law enforcement against conglomerate mergers in the last 10 years.

9/ The lower court had said that "while [a potential competitor] stays near the edge [of the market], it is a deterrent to current competitors ... This was Ford uniquely, as both a prime candidate for manufacture and the major customer of the dominant member of the [spark plug] oligopoly" (286 F. Supp. at 441, quoted at 405 U.S. at 587).

10/ The Supreme Court noted that this was not a "pure conglomerate merger", apparently since there were some economic relationships between the acquiring and the acquired firm (386 U.S. at 577 n. 2.) The analysis nevertheless follows the "potential" entrant analysis of conglomerate (and sometimes vertical) mergers.

11/ This "perceived" potential entry was pertinent to the Supreme Court's consideration of the case, because the lower court had previously found that Falstaff would not in fact have entered the market de novo. (See 410 U.S. at 530-31.) After remand of the Supreme Court case, the district court found further that Falstaff had not been "perceived" as a potential competitor and approved the merger (383 F. Supp. 1020, 1023 (D.R.I. 1974)).

C. Possible anticompetitive effects of joint ventures

1. Restrictions on potential competition

Joint ventures are collaborative efforts among firms, with respect to research and development, production, distribution or marketing of goods and services. They can include contractual collaboration, joint ownership or participation in the use of existing assets, or joint creation of a new enterprise to conduct manufacturing, distribution or research and development activities.12/ Joint ventures generally are subject to section 7 of the Clayton Act (United States v. Penn-Olin Chemical Co., 378 U.S. 158, 167-68 (1964)), as well as section 1 of the Sherman Act.

If two competitors enter into a joint operation in markets in which they compete on the basis of price and output, the arrangement could be characterized not as a "joint venture" but as a "cartel", prohibited under section 1 of the Sherman Act if anticompetitive effects are established. A different, more lenient view might be taken of a joint venture if only research and development or joint production (but not joint sales) were involved. Research and production joint ventures are discussed in chapter III. A. 2. below.

The leading joint venture case is United States v. Penn-Olin Chemical Co. (378 U.S. 158 (1964)), in which the Supreme Court identified "potential competition" issues involved in a joint venture, known as Penn-Olin Chemical Company, which was set up to produce and sell sodium chlorate in the south-east United States. The joint venture partners were Pennsalt Chemical Corporation, a manufacturer of sodium chlorate in the north-west United States, and Olin Mathieson Chemical Corporation, a chemical firm which purchased but did not manufacture sodium chlorate. The Court seemed to suggest that if both parties would have entered the market alone, but for the joint venture, the combined entry would have been anticompetitive (378 U.S. 173). If neither would have entered, the opposite result might have been obtained.13/ The Court did not broach the more difficult anticompetitive question which would have been posed if "either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor" (378 U.S. at 175-77)).

12/ Robert Pitofsky, "A Framework for Antitrust Analysis of Joint Ventures", 74 Georgetown Law Journal, 1605-6 (1986). The United States Department of Justice Antitrust Enforcement Guidelines for International Operations, 1989-1 Supplement 41 (cited hereinafter as "Guidelines") define a joint venture as "any collaborative effort among firms, short of a merger, with respect to R&D, production, distribution and/or the marketing of products or services" (supra at 41).

13/ In further proceedings the lower courts found that neither venture partner would have entered the market alone and that the venture was therefore procompetitive (246 F. Supp. 917 (D.Del. 1965)).

2. Anticompetitive effects outside the scope of the joint venture

Another potential anticompetitive concern, expressed by the United States Department of Justice in its 1988 Guidelines for International Operations (para 3.43) is that a joint venture may have "spillover" effects in markets other than those in which the joint venture will be operating. The primary example of such "spillover" effects would be information exchanges among joint venture partners for purposes of the joint venture's operations, which might "also serve to facilitate collusion in markets outside of the joint venture market or markets" (Idem).[14/] Typically these risks are addressed through safeguards concerning the exchange of information. These may include: requirements that certain competitively sensitive business information be disclosed only to neutral third parties; requirements that meetings between joint venturers be monitored by knowledgeable counsel; requirements that records of discussions be maintained; limits on joint decision-making on competitively sensitive subjects if joint venturers compete or if one is dominant; and requirements that marketing decisions should be left to the discretion of individual members of the venture. Without effective safeguards, the Department of Justice has indicated that it is prepared to take enforcement action if information exchanges have led to collusive effects - for example, price fixing - in a "spillover" market (Idem, at n. 97).

3. Restrictions by parents imposed on the natural development of the joint venture

While joint ventures are often set up for a specific, limited purpose, it is possible that in the future they may be in a position to expand their operations. As the Supreme Court noted in the Penn-Olin case, "it may be assumed that neither [parent] will compete with the progeny ..("378 U.S. at 169). Accordingly, either at the start of the joint venture process or later as the joint venture is considering expansions beyond its original purposes, it is possible that there would be a restraint on the operations of the joint venture if the joint venture threatens to compete with one or more of its original parents.

Penn-Olin establishes that the mere possibility of such a restraint is not a barrier to the establishment of a joint venture which otherwise satisfies competitive standards under section 7 of the Clayton Act. A joint venture's anticompetitive aspects may be addressed as they arise and need not be dealt with at the outset (United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 598 (1957)) (section 7 applies to the situation at the time a suit is filed rather than when the relationship was established). Such a situation was presented in United States v. Pan American World Airways, Inc., 193 F. Supp. 18 (S.D.N.Y. 1961), rev'd on other grounds, 371 U.S. 296 (1963),

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14/ Such "spillover" effects were described in United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 963 (D. Mass. 1950): "The intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices may inevitably reduce their zeal for competition inter sese in the American market".

when the court found that Pan American World Airways had abused its monopoly position in United States-South America air transportation when it used its 50 per cent interest in Pan American-Grace Airways, Inc. ("Panagra") (in effect a 50/50 joint venture of Pan American and W.R. Grace) to prevent the extension of Panagra's routes from the west coast of South America to the United States in competition with Pan American.

D. Foreign investment regulations

1. Exon-Florio provisions

In 1988, the United States Congress enacted the "Exon-Florio" provision as part of the Omnibus Trade Act of 1988 (Pub. L. No. 100-418, para. 5021, 102 Stat. 1107 (50 U.S.C. App. para. 2158)), which provides another mechanism whereby the entry of entrepreneurs and businesses into new markets in the United States by acquisition and merger may be restrained. Exon-Florio is not strictly speaking a law regulating Restrictive business practices, but it does have an effect on how firms are organized or how they can expand in the United States.

The Exon-Florio provision allows the President of the United States to block a proposed merger, acquisition or takeover which would result in foreign control of a United States business concern, when the President finds (a) that "there is credible evidence ... that the interest exercising control might take action that threatens to impair the national security" and (b) that other legal provisions (such as the antitrust laws) "do not in the President's judgment provide adequate and appropriate authority for the President to protect the national security in any matter before the President" (50 U.S.C. App. para. 2169 (d)).

These provisions have been invoked to prevent acquisitions only in a few instances in which the transfer of sensitive technology, related to national security, was thought to be involved. However, the scope of the Exon-Florio provisions are such that, even when the antitrust laws do not bar a particular acquisition or merger, the Exon-Florio provisions might be used to limit other acquisitions on grounds relating to competition.

2. Other foreign investment regulations

Beyond the Exon-Florio provisions, there are in the United States specific statutes and regulations that limit the entry of foreign entrepreneurs and foreign firms into lines of business in the United States. For example, only domestic United States "air carriers" may engage in certain air transportation activities within the United States. "Air carrier" is defined as "any citizen" of the United States, which is further defined as (a) any individual such citizen, (b) a partnership, each of whose partners is a citizen, and (c) a corporation as to which, among other things, "at least 75 percent of the voting interest is owned or controlled by" United States citizens (Federal Aviation Act of 1958, para. 101 (3), 101 (b), 49 U.S.C. App. para. 1301).

Chapter III

ANTICOMPETITIVE EFFECTS IN THE PRODUCTION PROCESS

A. Limits on research and development collaboration

1. General Considerations

The high costs of research and development and the speculative nature of many research projects make it difficult for firms to finance these efforts. Consequently, many competitors combine and undertake research and development on a collaborative basis. This reduces costs and risks by spreading them over two or more parties. On the other hand, research is a form of competition, and collaboration eliminates that competition. In a few market settings, that elimination of research competition may be a violation of law. Also, there may be situations in which the research joint venture itself is not illegal, but ancillary arrangements - for example, how products developed as a result of the research will be marketed - may constitute an RBP.

2. Direct competitive effects of the research venture

Research joint ventures are more likely to be viewed as an RBP if they occur in highly concentrated markets, involve applied rather than pure research, and involve participants who could have conducted research individually. Thus, the Department of Justice of the United States has stated in a guide on the subject:

> "If the cost and risk of the research in relation to its potential reward are such that the participants could not or would not have undertaken the project individually, then the venture will have the effect of increasing rather than decreasing innovation."15/.

3. Ancillary restraints

The Antitrust Division Guide for Research Joint Ventures, cited earlier, states that: "collateral restrictions subject to the rule of reason are lawful if they (1) are reasonably ancillary to a lawful main purpose of the agreement, (2) have a scope or duration no greater than necessary to achieve that purpose, and (3) are not part of an overall pattern of restrictive agreements that has unwarranted anticompetitive effects".

A "reasonable" collateral arrangement might be one between the participants in the venture to exchange data from previous research efforts. On the other hand, an illegal collateral agreement (and thus an RBP) might involve an agreement among the parents that they would market any products developed through the joint venture's research in different parts of the world (See Yamaha Motor Co. Limited v. FTC, 567 F. 2d 971 (8th Cir. 1981)).

4. Limitations upon access to the venture or its results

In those rare situations in which participation in the joint venture is essential to the ability to compete in a market, it may be an RBP for the members of the joint venture to unreasonably exclude participants. Thus the

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15/ See U.S. Antitrust Division, Guide to Research Joint Ventures (1980), Trade Reg. Rep. (CCH) section 13,120 at 20,651 (1989).

Department of Justice 1978 Research Joint Venture Guidelines provide:

> "If a joint research venture becomes the key to competing effectively in markets served by the participants, and if the research effort is not practicably or effectively duplicable by excluded firms, access to the venture (or its result ...) may be mandated by the Sherman Act." (see section 20,657).

Denial of access could be viewed as an attempt or conspiracy to monopolize, or the joint decision to exclude an applicant could be viewed as a boycott (see discussion in chapter IV. D. below).

In evaluating access restrictions, timing is a consideration. At the formative stage of a research joint venture, especially where pure research is to be jointly conducted, it will be difficult to predict whether participation in the venture is necessary in order to remain competitive. After the joint research venture has produced an important new technology, the question of access can be more pressing. Although access to a research joint venture may be required, that access need not be provided free of charge (see Research Guidelines, at section 20,658). On the contrary, the new participant can be charged a premium to take into account the successful research that took place before it joined.

5. Requirement of predisclosure

A perplexing question under American antitrust law is whether it is an RBP for a monopolist (or a group of firms with dominant market power) not to disclose in advance to rivals and possible customers the nature of new inventions.

In Berkey Photo Inc. v. Eastman Kodak Co. (603 F. 2d 263 (2nd Cir. 1979)), a small manufacturer of cameras sued Eastman Kodak which was a monopolist both with respect to an exceptionally successful camera line and a specially designed film. In 1972, Kodak introduced a modified version of both products, and gave other camera manufacturers little or no advance warning. Several of these small camera companies, including Berkey, then went out of business. Nevertheless, the court concluded that predisclosure of information about these new products was not required, reasoning that if the result were otherwise, aggressive competition in innovation would be discouraged.

6. National Cooperative Research Act of 1984

In order to protect and encourage research joint ventures and because the law in the United States was somewhat unclear, the United States Congress enacted a statute in 1984 reducing the liability of research joint ventures under its antitrust laws.

In general, the statute makes clear that a more lenient rule of reason approach will apply (see discussion in footnote 1 above) and that any damages that might have to be paid to private parties would be single rather than the treble damages which apply in other areas of antitrust. Aside from its specifications, the statute expresses general American policy to be lenient in regulation of research and development efforts.

B. Production joint ventures

In general, RBPs in connection with production joint ventures (for example, joint ownership of a new factory or a transportation system) raise similar issues, and are treated under American antitrust law in a similar way as joint research. Assuming the parties take the production of the joint venture and sell it separately, the likelihood that the arrangement would result in an RBP is extremely remote.

C. Restrictive business practices in connection with patent licensing

The Department of Justice Antitrust Division equates the transfer of intellectual property, such as patents, with the transfer of tangible assets. However, a patent license is unlike a transfer of tangible assets in that the licensor retains the right to use the patent, and licensing facilitates dissemination of cost-efficient technology and innovations.

A patent owner may maximize profits and protect its competitive status in the market by imposing certain use restrictions in its license.16/ Such restraints, while furthering the purposes of the patent laws by promoting patent licensing and profitability of innovation, may inhibit competition and thereby undermine the antitrust laws. The Antitrust Division assesses whether the procompetitive effects of a restrictive licence outweigh its potential to "create, enhance or facilitate the exercise of market power beyond that which is inherent in the intellectual property itself". A sample of RBPs (or "use restrictions") that can occur in connection with patent licences is discussed below.

1. Territorial restraints

As will be discussed in chapter IV below, agreements between competitors to divide the territories in which they sell their products are prohibited by both the Sherman Act and the Federal Trade Commission Act.17/ Nevertheless, the patent law provides that a patent holder can grant and convey an exclusive right in "the whole or any specified part of the United States".18/

The courts of the United States have held that a patent holder can designate the territories in which its licensee can sell a patented product even though such agreements would not be permitted if the product were unpatented.19/ Courts have also upheld and enforced agreements granting

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16/ See United States v. General Elec. Co., 272 U.S. 476, 490-91 (1926); Sullivan, Antitrust 525-28 (1977); International Guidelines, at 66-8.

17/ See United States v. Topco Associates, 405 U.S. 596, 608 (1972); Yamaha Motor Co. v. F.T.C., 657 F. 2d 971,981 (8th Cir. 1981), cert. denied, 465 U.S. 915 (1982).

18/ See 35 U.S.C. para. 261.

19/ See Sullivan, supra note 16, at 528-29; Miller Instituform, Inc. v. Instituform of North America, Inc., 605 F. Supp. 1125, 1130-31 (M.D. Tenn. 1985), aff'd, 830 F.2d 606 (6th Cir. 1987).

licenses to several licensees which carve out exclusive territories for each.[20]

2. Price restraints

Under the antitrust laws, agreements between competitors setting the prices of their products are illegal per se.[21] This area of United States law will be discussed more fully in chapter IV below. Yet, in United States v. General Electric, the Supreme Court sanctioned price-fixing agreements between competitors which are part of a patent license for the price-fixed product.[22] This holding has, however, been limited in the last 65 years.[23]

(a) Licences involving a large portion of the market

The immunity of price-fixing patent licenses from the antitrust laws has been limited where, through a patent license, a firm is able to fix prices in a substantial portion of an industry.[24] This occurred in United States v. Gypsum Co.[25] Gypsum granted identical price-fixing licenses to all firms in an industry and its prices became the prices industry-wide. The Supreme Court refused to exonerate those agreements under General Electric but held them to violate the Sherman Act.[26]

The Court held that if, from the entire context, it appeared that the purpose or effect of the price fixing-licenses was to decrease competition, the licenses were illegal.[27] In determining whether the purpose or effect of price-fixing licenses is to lessen competition, it must be shown that a significant percentage of the market is affected by the arrangement. Other factors indicative of a purpose or effect to reduce competition include: large combined market shares of the licensor and licensee(s), indications of interdependence between the licensor and licensees, weak or commercially insignificant patents, price differentials between non-patented and patented products which use patented products price as a base, and less competitive performance after institution of the arrangement (shown when prices become less responsive to changes in demand).[28]

20/ See Miller Instituform, 605 F. Supp. at 1131; Deering, Milliken & Co. v. Temp-Resisto Corp., 160 F. Supp. 463, 480-81 (S.D.N.Y. 1958); Security Materials v. Mixermobile Co., 72 F. Supp. 450, 453-56 (S.D. Cal. 1947).

21/ United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940).

22/ See United States v. General Elec. Co., 272 U.S. 476, 493-94 (1926).

23/ Sullivan, supra note 16; at 545; see, e.g., United States v. Line Material Co., 333 U.S. 287, 311 (1948). Some of these limitations arose out of distinctions where there were actually no differences.

24/ See, Sullivan, supra note 16, at 545, 552; Newburgh Moire Co., 237 F.2d at 291-94.

25/ See 333 U.S. 364 (1948).

26/ Idem at 389-93.

27/ See Sullivan, supra note 16, at 552; Gypsum Co., 333 U.S. at 389-93; United States v. Masonite Corp., 316 U.S. 265, 276-83 (1942).

28/ Idem at 545, 552.

(b) Patents not pertaining to end products

Courts have also been reluctant to sanction price-fixing licenses pertaining to a patent which does not cover an end product. Specifically. license agreements for patented processes or machines which purport to fix the price of the unpatented end product have been held to violate the Sherman Act.[29/] In addition, when a patent is for an intermediate product whichwill be incorporated into another product, licensing agreements which fix the price of the end-product are suspect.[30/]

(c) Licenses sold by non-producing patent holder

One rationale for allowing price fixing in patent licenses is that by enabling the patentee to accrue maximum benefit from selling the license and preserve its competitive status in the market, it thereby encourages licensing. However, this rationale does not apply when the patentee is not competing in the patented product market. Therefore, some courts have held that price-fixing licenses by a patent holder who is not a manufacturer, the patented products are not entitled to General Electric protection.[31/]

(d) Patents held by two or more patentees and cross licensing

The Supreme Court has held that the holding in the case of General Electric does not apply to price-fixing licenses pertaining to patents held by multiple patentees.[32/] In addition, it may be that price-fixing licenses for more than one patent violate the Sherman Act.[33/] Consequently, the Supreme Court has held that agreements fixing prices in a cross-license of competing patents violate the Sherman Act.[34/]

(e) Patents with minimum social advantage

As previously pointed out, one reason certain restrictions that would generally violate the antitrust laws are sustained in the context of patent licensing is because, by promoting licensing, they encourage the dissemination

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29/ See Cummer-Graham Co. v. Straight Side Basket Corp., 142 F.2d 646, 648 (5th Cir.), cert. denied, 323 U.S. 726 (1944); American Equip. Co. v. Tuthill, 69 F.2d 406, 409 (7th Cir. 1934); but see Straight Side Basket Corp. v. Nebson Basket Co., 82 F.2d 245, 246 (2d Cir. 1936).

30/ United States v. General Elec. Co., 80 F. Supp. 989, 1004-005 (S.D.N.Y. 1948); see also General Elec. Co. v. Willey's Carbide Tool Co., 33 F. Supp. 969, 977-78 (E.D. Mich. 1940).

31/ See Sullivan, supra note 16, at 546; United States v. American Linen Supply Co., 141 F. Supp. 105, 113-14 (N.D. Ill. 1956); United States v. Vehicular Parking Ltd., 54 F. Supp. 828, 835-38 (D. Del. 1944).

32/ See United States v. Line Material Co., 333 U.S. 287, 310-15 (1948); see also in Re Yarn Processing Patent Validity Litig., 541 F.2d 1127, 1135 (5th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

33/ See Sullivan, supra note 16, at 548; Newburgh Moire Co. v. Superior Moire Co., 237 F.2d 283, 293-94 (3rd Cir. 1956).

34/ See Line Material Co., 333 U.S. at 310-15.

of beneficial products and technologies. This rationale is not valid where there is no social benefit to a particular patent and therefore it has been suggested that price fixing licenses for patents not conferring societal advantages should be excluded from General Electric protection.35/

3. Horizontal restrictions on field of use

Where a patent has application in more than one commercial field, a licence may exclude a field or fields. Field restrictions imposed on a single licensee are generally lawful.36/ However, arrangements which grant exclusive field licenses to several licensees thereby dividing fields among competitors may be problematic.37/ Also, field-of-use restrictions by a licensor on products manufactured by a patented machine or process may be invalid 38/

35/ See Sullivan, supra note 16, at 550-51.

36/ See Sullivan, supra note 16, at 554-562; General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175, 181-83 (1938).

37/ See Sullivan, supra note 16, at 561.

38/ See Robintech, Inc. v. Chemidus Wavin, Ltd., 628 F.2d 142, 148-49 (D.C. Cir. 1980). But see United States v. Studiengesellschaft Kohle, M.B.H., 670 F.2d 1122, 1135 (D.C. Cir. 1981).

Chapter IV

MARKETING AND DISTRIBUTION ARRANGEMENTS

Aside from challenges to mergers, the most active form of American antitrust enforcement involving RBPs concerns marketing and distribution arrangements. Most such enforcement is directed to collaborative action (agreements in "restraint of trade") reviewed under section 1 of the Sherman Act and various provisions of the Clayton Act. Occasionally, single firms can adopt policies that are so anticompetitive in effect and so lacking in business justification that they will be characterized as an attempt to monopolize under section 2 of the Sherman Act.

A. Price fixing

The most serious type of violation of American antitrust law involves agreements among competitors that have a direct effect upon price. This sort of classic cartel behaviour can be punished both under criminal law and in civil enforcement and frequently results in payment of vast damages to injured parties.

Where there is no plausible business justification for the arrangement, the law is broad and sweeping as to what constitutes an "effect on price". In United States v. Socony-Vacuum Oil Co. (310 U.S. 150 (1940), the United States Supreme Court said:

> "... A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se".

Price fixing is equally illegal where the agreement relates to the fixing of price for sale or for purchase; also, illegal price fixing can be found with respect to services as well as products.

Concept of "agreement"

As noted, price fixing is illegal only when it is a part of cartel behaviour. Every firm, acting alone, has an absolute right to fix the price at which it will sell its product, and even a monopolist can legally set a monopoly price. The more difficult question under American law is what constitutes an agreement and thus an RBP relating to price fixing.

Many companies sell commodities at exactly the same price and do so with an awareness that competitors are charging that price. Generally speaking, similarity of prices does not constitute an "agreement". In addition to similarity, United States enforcement agencies and courts will look for evidence of failure to depart from uniform prices when economic conditions suggest that would be reasonable, high profits, artificial standardization of product to facilitate uniform pricing, and direct evidence of agreement as to price such as secret meetings and communications.

B. Market division

In general, allocation or division of markets is treated exactly the same as price fixing. An RBP can arise where competitors agree to service separate geographic areas, to manufacture and sell different products, or to serve different categories of trade.

In United States v. Topco Associates, (405 U.S. 596 (1972)), a cooperative association of 25 or 30 small and medium sized supermarket chains agreed to jointly purchase food products and sell each under the name "Topco". The parties further agreed that each member would sell Topco products in an allocated geographic area, and no new Topco outlet could be approved without the consent of all parties. In fact, there was usually only one set of stores selling the Topco brand in each geographic area. Despite the fact that Topco was a small operation competing against very large supermarket chains, the Supreme Court declared the arrangement illegal on the same basis as if it had involved horizontal price fixing.

C. Limitations on output

Agreement among competitors to limit output is seen under American law as an indirect way of achieving price fixing. As a result, it is regarded as a serious RBP and is illegal per se (National College Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 1 (1984)).

D. Boycotts

Where a group of firms combine and agree not to supply a service or commodity to another firm, that is a concerted refusal to deal and can constitute an RBP under American antitrust law. For many years, that conduct was regarded as illegal per se (see discussion at note 1) and was treated very strictly under American law (see Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)). Today, American law would distinguish between various kinds of "boycotts":

(a) A boycott with the sole aim of supporting a cartel, and lacking any business justification, is still likely to be treated severely. For example, a group of firms might agree to a particular price level and then one firm might defect. If the other firms then coerce suppliers into refusing to furnish products to the uncooperative member of the group, that would almost certainly be an illegal RBP under United States law.

(b) Sometimes boycotts are an unavoidable consequence of an efficient organization. For example, a group of firms might agree to participate in a cooperative buying organization, and then decline to allow additional firms to participate. In a sense that is a "boycott", but it is an almost inevitable consequence of the arrangement and not likely to be treated severely.

(c) Boycotts are often necessary to the organization of professional sports. For example, under American law it is not illegal for a sports team to be located in (and be associated with) a particular city and for all other teams in the league to decline to compete in that city. Such arrangements are said to be essential to maintaining competitive balance within the league.

(d) Some boycotts are achieved through "state action". In one case, a group of trucking firms sought legislation from a state which would have disadvantaged competitive railroads, and the railroads sought comparable legislation that would injure the truckers. The denial of benefits, if achieved through private action, might have been regarded as a "boycott", but where the effort is directed to a state agency, it is protected from challenge as a violation of law (see Eastern Railroad Presidents Conference v. Noerr Motor Freight Co., 365 U.S. 127 (1961)).

(e) Some boycotts are organized for non-commercial purposes. For example, a political group might organize a boycott of hotels in a particular city or state that has enacted legislation it regards as unwise. Particularly since the benefits of the boycott do not result in economic advantage of the participants in the boycott, it will usually not be found to be an RBP under American law.

E. Vertical price fixing

It is a violation of American antitrust law for a manufacturer or other supplier to agree with a distributor with respect to the price a distributor will charge. This rule applies both to maximum and minimum resale price fixing.

1. Limits on the doctrine

While vertical price fixing agreements would constitute an RBP, it is not illegal to choose distributors with a reputation for charging full price, or to suggest to distributors the price of manufacturer would like to see charged.

2. Colgate

One of the more controversial doctrines under American antitrust law permits the manufacturer or other supplier to suggest a resale price to the distributor and then discontinue doing business with the distributor if it does not comply. This is the so-called Colgate doctrine and it traces its history to a 1919 Supreme Court case, United States v. Colgate & Co.(250 U.S. 300 (1919)). The manufacturer must behave unilaterally and cannot seek allies in its efforts to induce the supplier to charge a particular price and cannot negotiate over what the price can be. But if it sticks to the formula of stating the terms under which it will deal, and termination of those who do not abide by those terms, its rights are protected (see United States v. Parke Davis & Co., 362 U.S. 29 (1960)).

F. Vertical customer and territorial allocation

United States manufacturers and other suppliers frequently specify the territory in which a distributor may sell (for example, in particular state) or the class of customers to whom it can sell (for example, department stores but not discount houses). Unlike vertical price fixing, United States law is generous with respect to these arrangements, and will declare them illegal and an RBP only if the supplier has an extremely large market share, or all

suppliers of the product adopt the same policy, or there is evidence that the allocation scheme was really thought up by the dealers and imposed on the manufacturer. In practice, it is very rare that a court will find that vertical territorial allocation or vertical customer allocation constitutes a violation of law (see Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)).

G. Tie-in sales

A special United States statute (section 3 of the Clayton Act) declares that it is illegal to sell one product on condition that the purchaser accept a separate product where the effect of that transaction is to lessen competition. In order to find a tie-in sale illegal, several conditions must be satisfied:

(1) Separate products

It would not be a tie-in sale for a seller to insist that a purchaser accept tyres when he or she buys a car, but it has been held to be a tie-in sale when a railroad sold land to purchasers on condition that they ship any products on the land on the seller's railroad (see Northern Pacific Railway v. United States, 351 U.S. 1 (1958)). In general, the question of whether one product or separate products are involved turns on whether it is much more efficient to manufacture and sell the products [illegible]ntly.

(2) Economic power

A tie-in sale is illegal only if the seller has substantial economic power (probably more than 30 per cent of the market) with respect to the tying product.

(3) Substantial amount of commerce

Tie-in sales are disregarded under United States law where only a small amount of commerce is involved. For example, if a grocery store insisted that purchasers buy bread in order to buy milk, that would be regarded as an insignificant economic transaction.

(4) Business justification

Tie-in sales can be defended on grounds that the seller's product does not work well unless the purchaser buys all components from the same source (see Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971)).

(5) Coercion

In order to constitute an RBP, there must be some indication that the purchaser did not voluntarily take both products but rather was coerced by activities of the seller.

H. Reciprocity

It was regarded as illegal under American antitrust law and thus an RBP for a seller to agree to buy products from a customer on condition that the customer agree to buy other products from the seller. In recent years, challenges to these "reciprocity" arrangements have been rare.

I. Exclusive dealing and exclusive distributorship arrangements

A seller may agree to sell only to a particular distributor or customer, or a distributor or customer may agree to buy only from a specific supplier. In either situation, competitors at the supply level or the distribution level are denied a source of supply.

These arrangements generally are treated generously under American antitrust law. They would be declared illegal only if the percentage of the market tied up in the transaction was very large - probably more than 25 per cent or 30 per cent. These transactions often produce a wide variety of efficiencies - security in future planning, reduction in transaction costs, etc. - and usually do not significantly lessen competition. Especially when the duration of the contract is short, it would be rare to find any antitrust problems.

Example 1 - Exclusive dealing

American gas stations frequently agree that they will distribute only the branded gasoline of one supplier through their stations. The use of such contracts is common and unlikely to constitute an RBP (Standard Oil Co. of California v. United States, 337 U.S. 293 (1949)).

Example 2 - Exclusive distributorship

Automobile companies in the United States frequently commit to sell their type of autos only through a particular dealership in a particular community. These transactions are almost never challenged.

J. Information exchanges

Firms in an industry, often through their trade associations, will exchange data with respect to price, output, production techniques, etc. In general, these information exchanges are procompetitive and do not constitute an RBP.

Exceptions to that lenient rule generally are characterized by the following:

(a) Exchanged information with respect to price and output is most dangerous, and occasionally will constitute a violation of American antitrust law. If the price data has to do with past transactions and constitutes averages, a finding of illegality is less likely; if the information involves future transactions and is specific as to particular transactions (for example, by identifying the price at which particular transactions occurred), serious problems can arise.

(b) Information exchanges in deconcentrated markets would rarely constitute a problem, but will be viewed more suspiciously in highly concentrated markets.

(c) Level of detail can create a problem. Information exchanges with respect to price that identify the buyer and seller are more likely to be viewed as an RBP than aggregate statistics which identify no particular firm.

K. Restrictions on Non-Price Terms of Sale

Generally, horizontal arrangements with respect to the amount of advertising or delivery (for example, swaps of commodities between firms) do not constitute an RBP. On the other hand, as these agreements come closer to affecting price (for example, an agreement among firms as to the terms of credit that may be extended), more serious RBP problems arise. In Catalano, Inc. v. Target Sales, Inc. (446 U.S. 643 (1980), a group of beer retailers agreed with respect to the period of time during which they would extend interest free credit. The court found that the agreement extinguished one form of competition, and because there was no apparent business justification, held the practice illegal.

L. Predatory pricing

Occasionally a firm can charge a price so low that it will be regarded as "predatory" - that is designed to drive competitors out of the market - and therefore illegal.

The great problem under American law is defining what constitutes, price so low as to constitute an RBP. There is a sharp division among different courts in the United States. Some courts would find that a price is not illegally low unless it is below average variable cost (that is, the cost of ingredients and labour only - excluding depreciation, debt interest and taxes) (see Northeastern Telephone Co. v. AT&T Co., 651 F.2d 76 (2d Cir. 1981)). Other courts regard prices as illegal if they are below full cost, where other factors indicate an unfair competitive purpose (Transamerica Computer Co. v. IBM, 481 F. Supp. 965 (N.D. Cal. 1979)). Virtually all United States courts would agree that if the price is above full cost, there are no circumstances in which it would be regarded as illegal.

Regardless of which rule of predation is chosen, all American courts probably will allow a firm to charge any price - regardless of how low - if it is only meeting the competition of another supplier.

M. Price and service discrimination

One of the most controversial areas of antitrust law in the United States involves the question of when it is illegal to discriminate in price or services between different customers. American rules on the subject can be traced to a 1936 statute (the "Robinson-Patman Act") which proscribes in great detail legal restrictions, defenses and exceptions in the discrimination area. The law with respect to discrimination is unusually complex and the description below can only touch upon the major features of enforcement.

In general the statute provides that it is illegal to discriminate in price between different purchases of commodities of like grade and quality where the probable effect will be to substantially injure competition. The injury can either be to a competitor (where the discriminatory lower price takes business away from a rival) or to a customer (where a low price to one customer injures the business of another). In recent years, findings of illegality based on discrimination have become much more rare, partly because the courts have been more demanding, insisting on proof of injury to

competition, and partly because defenses to discrimination have been expanded. Among the many defenses against in which a charge of an RBP in connection with discrimination can be defended against are the following:

(1) Injury

Where the claim is injury to a rival, most courts insist now that the discriminatory low price be below cost or that there be clear evidence that the purpose of the lower price was to injure that rival (see International Air Industries Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975)). Where the claimed injury is to one customer who received a better price than another, the courts appear to reject the earlier presumption that a substantial discrimination in a competitive industry will result in injury (Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948)). Most courts today would examine all competitive factors to determine whether any injury occurred as a result of discrimination.

(2) Meeting competition

The statute provides that a charge of discrimination can be defended against with proof that the lower price was offered in good faith to meet the equally low price of a competitor. This "meeting competition" defense has been given a broader interpretation in the American courts. For example, it is now clear that a defense of meeting competition applies not only where a seller is trying to preserve previous business but also where it is trying to obtain new business (Falls City Industries v. Vanco Beverage, 460 U.S. 428 (1983)).

(3) Cost justification

The statute also provides that prices may be different if they only allow for differences in cost of manufacture, sale or delivery resulting from differing methods of sale or quantities purchased. The "cost justification" defense has been given a rather narrow interpretation in the United States and requires that the defending party establish very clearly that differing costs justify differing prices (United States v. Borden Co., 370 U.S. 460 (1962)).

(4) Allowances and services

Occasionally sellers discriminate by providing certain kinds of cash allowances (such as for advertising) or services (such as demonstrators of products) in a discriminatory way. American antitrust law applies to such transactions, although many of the defenses to price discrimination (no injury, meeting competition, etc.) would also apply.

(5) Knowing receipt of a discrimination

Not only are sellers who discriminate covered by American antitrust law, but is is also an RBP for a firm knowingly to receive a discrimination which is otherwise prohibited under the statute.

Chapter V

RESTRICTIVE BUSINESS PRACTICES IN MARKETS FOR ANCILLARY SERVICES

As noted at the outset of this paper, some areas of economic activity are only partially covered by American antitrust laws. In these areas, the definition of an RBP involves an attempt to harmonize policies prohibiting restraints on competition while at the same time encouraging collective action that may serve other social goals.

It is impossible in a brief paper to review all of these areas at the edge of antitrust policy. Three have been selected for discussion below: restraints by organized labour, partial exemptions for the insurance industry, and standards applicable to banks and other financial institutions.

A. Labour Union activity

Frequently the actions of unions take the form of collaborative activity (for example, strikes) in order to extract higher wages or better working conditions.

Technically, these activities could be regarded as "restraints of trade", but they usually are not so viewed when the labour market is involved. The courts nevertheless insist on certain qualifications. Collaborative labour activity is fully or partially exempt from the antitrust laws only when it seeks to alter the terms of conditions of employment (Hunt v. Crumboch, 325 U.S. 821 (1945)); a labour organization - that is an economically integrated group of workers - is involved (American Federation of Musicians v. Carol, 391 U.S. 99 (1968)); the union must be acting in the interest of its members rather than to advance the interest of other entities such as management (United States v. Hutchenson, 312 U.S. 219 (1941)); and the activities must not occur in concert with non-labour groups (again, such as management). Where those conditions are met, economic activity by labour unions are likely to be immune from attack as an RBP.

B. Insurance Industry

If there were unrestricted competition in the insurance industry, that might lead to inadequate premium rates and eventual insolvency of insurance companies. As a result, insurance companies will not be charged with an RBP if they are truly in the "business of insurance", regulated by state law, and their behaviour does not amount to an act of boycott, coercion or intimidation.

One of the most difficult questions is determining when a firm is in the "business of insurance"; the key factors that will be assessed are (a) whether the company is engaging in an underwriting or risk-spreading function with respect to the challenged conduct; (b) whether the conduct involves a relationship between the insurer and the policyholder; and (c) whether the conduct is limited to activities between entities within the insurance industry (Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979)). The next question that would be asked is whether there is real state regulation. If there is, then the only conduct that would be challenged as an RBP would involve a boycott, coercion or intimidation. All other possible RBPs are immune from legal challenge.

C. The business of banking

As with insurance, public policy seeks to promote competition in the banking industry, but not to the extent that it affects the solvency of financial institutions. Generally, banks and banking activities are covered by American antitrust law - but a much more lenient policy with respect to mergers applies. In the merger area, an otherwise anticompetitive transaction will be permitted if it is found that the transaction meets the "convenience and needs" of the community to be served.

With respect to other activities - for example, price fixing, refusals to deal, or other coercive conduct - banks can be found guilty of RBPs like other business units.

Chapter VI

RESTRICTIVE BUSINESS PRACTICES IN INTERNATIONAL TRADE

A complicated question in American antitrust law relates to the extent to which those laws affect transactions that occur wholly or in part outside the United States. For example, suppose that an American firm doing business in northern Europe agrees with a European firm doing business in southern Europe that one firm will have exclusive rights to trade in Scandinavia and Germany while the other firm will have exclusive rights in France, Italy and Spain. A comparable arrangement affecting trade in the United States would be illegal.

There are scores of American cases on the subject, many difficult to reconcile. In an effort to clarify the area, the United States Congress enacted a law in 1982 entitled The Foreign Trade Antitrust Improvements Act. It provided that American antitrust laws will not apply to trade or commerce in foreign countries unless such conduct (a) has a direct, substantial and reasonably foreseeable effect on competition within the United States or on the export trade of American firms and (b) the conduct constitutes a violation of some other American antitrust law.

The purpose of the legislation was to establish that the antitrust laws will not apply to export trade or transactions foreign to the United States, and that there must be some direct, substantial or reasonably foreseeable effect on competition within the United States for the antitrust laws to apply to import transactions. Thus, the United States to a much lesser extent attempts to establish the existence of RBPs relating to trade in non-United States countries.